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No. 90-1488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the vague and amorphous terms of Section 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980 (the "AAA"), 42 U.S.C. § 671(a)(15), which requires that states have a plan to ensure that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home," create individual federally-enforceable rights in the complex area of child welfare.

2. Whether Section 671(a)(15), codified in Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-79a, which does not provide any federal funds for services to children living at home, nonetheless creates a federal right to such services.

LIST OF PARTIES

The parties to the proceedings below were petitioners Sue Suter (and her predecessors Jess McDonald and Gordon Johnson), Director of the Illinois Department of Children and Family Services ("DCFS" or the "Department"), and Gary T. Morgan, DCFS Guardianship Administrator, both sued in their official capacities. Respondents included Artist M., Sarah B., Claude F., Algienan G., Myron C., Willie M., Brandon W., and Amber B., individually and on behalf of all similarly situated individuals, by their next friend Patrick T. Murphy, Public Guardian of Cook County, Illinois.

The district court certified two classes. Class A includes all children in the custody of DCFS pursuant to temporary custody orders entered by the Circuit Court of Cook County, Juvenile Division ("Juvenile Court"), and children who remain in their own homes under Juvenile Court protective or supervision orders, who are or will be without a DCFS caseworker for a significant period of time. Class B is a sub-class of Class A limited to children in the custody of DCFS.

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 917 F.2d 980 and is reprinted in the Appendix to the Petition for a Writ of Certiorari[1] at page 1a.

The opinion of the United States District Court for the Northern District of Illinois (Shadur, J.) on defendants' motion to dismiss is reported at 726 F. Supp. 690 and is reprinted at App. 32a.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1990. (App. 1a). Defendants filed a timely petition for rehear-

[1]Record citations will use the following abbreviations. "J.A." cites to items in the Joint Appendix. "App." cites to items in the Appendix to the Petition for a Writ of Certiorari. "Tr." cites to transcripts in the district court. "R." cites to items in the district court record.

ing with suggestion for rehearing en banc with the court of appeals on November 14, 1990. On December 20, 1990, the court denied that petition. (App. 31a).

On March 20, 1991, defendants filed the Petition for a Writ of Certiorari ("Petition") in this Court. Twenty-eight states and the District of Columbia filed a brief in support of the Petition. This Court granted the Petition on May 13, 1991. This Court's jurisdiction is based on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 671(a)(15) of the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15), codified as part of Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-79a, provides:

> (a) In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which—
>
> . . .
>
> (15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

42 U.S.C. § 1983 ("Section 1983"), provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case concerns whether federal courts may alter the federal-state contract contained in a spending clause statute by creating new largely indeterminate federal rights in the complete absence of any statutory objective benchmarks defining those rights. Section 671(a)(15) of the AAA requires that States have a "plan for foster care and adoption assistance" providing that "in each case, reasonable efforts will be made" to keep a child at home or return a child home from foster care. The court of appeals majority held that this "reasonable efforts" clause creates federal rights enforceable through Section 1983. (App. 9a-14a). The court reached this conclusion without even acknowledging the well-established principle contained in *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), that Congress must clearly define any federal rights imposed on the States in a federal funding statute, and without conducting the "crucial inquiry" required by *Pennhurst* as to Congress' intent in enacting Section 671(a)(15).

Utilizing a similar cursory analysis, the court of appeals also found that Section 671(a)(15) creates an implied private right of action (App. 14a-18a) without addressing the evidence in the language, structure, and legislative history of the statute to the contrary. In addition, the court held that this section also creates a federal right to services for children living at home (App. 18a), notwithstanding that the AAA provides no federal funds under Title IV-E for such services.[2]

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[2]This appeal does not raise any factual issues regarding the two preliminary injunctions entered by the district court. These injunctions effectively require that DCFS immediately assign and continuously maintain a caseworker for each class member. (App. 51a, 57a). The Department does not contest the general proposition that under sound child welfare practices, cases should be assigned to caseworkers as quickly as possible. In fact, months before plaintiffs had even initiated this action, DCFS had recognized the existence of problems in its

(Footnote continued)

The Complaint And The Parties

Plaintiffs filed this action for declaratory and injunctive relief under Section 1983 on December 14, 1988, alleging that DCFS has violated the Fourteenth Amendment and Title IV-E by failing promptly to assign and reassign caseworkers to plaintiffs' cases. (J.A. 5).

Plaintiffs represent a class of children who are or will be in the custody of DCFS pursuant to temporary custody orders entered by the Juvenile Court, and children who remain in their own homes under Juvenile Court protective or supervision orders, who "are now or will be without a DCFS caseworker for a significant period of time." (R. 10).[3] Under the Illinois Juvenile Court Act, children may be removed from their parents and placed in the temporary custody of DCFS after a hearing and order by the Juvenile Court. Juvenile Court Act § 2-7, Ill. Rev. Stat. ch. 37, ¶ 802-7. The Juvenile Court Act also provides that the court may allow children to remain at home pursuant to involuntary protective orders or agreed supervision orders setting forth the conditions for maintaining the children at home. Juvenile Court Act §§ 2-24, 2-25, Ill. Rev. Stat. ch. 37, ¶¶ 802-24, 802-25. The Juvenile Court Act does not specify the terms of such orders or that such cases be placed under DCFS supervision. *Id.*

Defendant Sue Suter is the Director of DCFS. Defendant Gary T. Morgan is DCFS Guardianship Administrator. (J.A. 8). Plaintiffs sued defendants individually and in their official capacities, but, given that the Complaint seeks only declaratory and injunctive relief, this is an official capacity suit. (J.A. 9).

(Footnote 2 continued from previous page)
caseworker assignment procedures and begun implementing a Reorganization Plan to expedite case assignment. This appeal only concerns the underlying legal basis for plaintiffs' claims and the injunctions.

[3]The district court certified two plaintiff classes. The claims asserted by Class B, limited to children in DCFS custody, have been dismissed and are no longer at issue in the case. (R. 10).

DCFS is the sole state agency charged with providing child protective and child welfare services to abused and neglected children and their families in Illinois. Illinois Abused and Neglected Child Reporting Act ("ANCRA") § 7.3, Ill. Rev. Stat. ch. 23, ¶ 2057.3; Act Creating DCFS § 1, Ill. Rev. Stat. ch. 23, ¶ 5001. The Department investigates reports of abuse or neglect, offers protective services, and takes protective or temporary custody when necessary to protect a child. ANCRA § 2, Ill. Rev. Stat. ch. 23, ¶ 2052. The Department is required by state law to begin investigations within 24 hours of receipt of all child abuse and neglect reports called into the Department's statewide hotline. ANCRA § 4, Ill. Rev. Stat. ch. 23, ¶ 2057.4. In an average year, approximately half of those reports are "indicated," meaning the Department finds credible evidence of abuse or neglect. (1/17/89 Tr. at 263-64).

In addition to protective services, DCFS provides a wide array of child welfare services to children and families. The Department is the sole state agency providing and caring for children removed from their homes and placed in foster homes and other placements; providing placement prevention and reunification services; and placing children in adoptive homes. Act Creating DCFS § 5, Ill. Rev. Stat. ch. 23, ¶ 5005.

The Proceedings In The District Court

On the same day plaintiffs filed their Complaint, they filed a preliminary injunction motion seeking (i) assignment of a caseworker to plaintiffs' cases within 24 hours following the initial Juvenile Court order and (ii) continuous assignment of a caseworker thereafter. (R. 5). The district court held a hearing on plaintiffs' motion in January 1989. (1/17/89-1/19/89 Tr.). At the hearing, plaintiffs presented anecdotal evidence of delays in DCFS's assignment of caseworkers to cases. DCFS had recognized the problem of delays months before the litigation. Defen-

dants presented evidence of a Reorganization Plan the Department had previously initiated in an attempt to address delays in case assignment.

Following the hearing and briefing by the parties, the court did not rule on plaintiffs' motion for over a year. Eight months after completion of the hearing, the district court reopened discovery, so that plaintiffs could explore defendants' progress in implementing the Reorganization Plan. (R. 46). Because the court had extended discovery and deferred ruling on a preliminary injunction motion that lacked any legal foundation, defendants moved to dismiss plaintiffs' Complaint for failure to state a claim upon which the court could grant relief. (R. 51).

On November 21, 1989, the district court ruled on defendants' motion, granting the motion to dismiss plaintiffs' constitutional claims, but refusing to dismiss plaintiffs' claims under the AAA. (App. 32a). The court held in part that plaintiffs have a right under Section 671(a)(15) to obtain "preventive and reunification services." (App. 39a). Defendants filed a motion asking the court to reconsider its ruling, which the court denied on December 7, 1989. (R. 75).

In ruling on the motion to reconsider, the district court orally clarified its ruling and stated that the only remaining legal basis for plaintiffs' claims was the "reasonable efforts" clause, 42 U.S.C. § 671(a)(15). (12/7/89 Tr. at 2-3). The court also modified its view that the "reasonable efforts" clause creates a right to individual substantive services, instead stating that the AAA creates a right only to a "system" or "administrative arrangement" to provide "reasonable efforts." (*Id.* at 4, 6).

The district court's November 21, 1989 ruling on the motion to dismiss is the subject of this appeal. In addition to that ruling, the court of appeals reviewed a systemic, mandatory preliminary

injunction entered by the district court on March 2, 1990, after additional discovery and briefing by the parties. The March 2 injunction requires that DCFS assign a caseworker to all court cases within three working days of the initial Juvenile Court order and that no case remain unassigned for more than three working days at any time thereafter. (App. 51a). The order applies to all class members, including all children who remain at home under Juvenile Court orders. (App. 51a).

On plaintiffs' motion to amend the preliminary injunction, the district court on April 3, 1990, amended the injunction to require that DCFS each week provide plaintiffs with a list of newly assigned or reassigned cases, their assigned caseworkers and those workers' telephone numbers, and any previously assigned workers, for the stated purpose of monitoring defendants' compliance with the March 2 injunction. (App. 57a).

Defendants filed timely notices of appeal from the March 2 and April 3 injunctions and the ruling on defendants' motion to dismiss. (R. 99, 103). Defendants moved before the district court to stay the injunctions pending appeal to the Seventh Circuit. (R. 104). In denying that motion, the district court provided a third explanation as to what "reasonable efforts" the court believed were required by Section 671(a)(15) of the AAA.[4] The court concluded that, in initiating voluntary efforts to improve case assignment procedures, the Department itself had defined what "reasonable efforts" the AAA required, and, since those efforts were only 75 percent effective, defendants had failed to exercise reasonable efforts. (4/9/90 Tr. at 11-12, 18). Thus, the court created federal rights based on the State's own actions, an approach later adopted by the court of appeals.

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[4]As discussed above, the district court first held that Section 671(a)(15) creates a right to preventive and reunification services. (App. 39a). The court later rephrased the right as encompassing only a "system" or "structure" that provides "reasonable efforts." (12/7/89 Tr. at 4, 6).

The Proceedings In The Court Of Appeals

After expedited briefing, the appeal was argued on June 20, 1990, just six days after this Court's decision in *Wilder v. Virginia Hospital Association*, 110 S. Ct. 2510 (1990). Following argument, the Seventh Circuit entered an order on June 21, 1990 (J.A. 49), which was modified on June 27, 1990 (J.A. 51), partially remanding the case to the district court. The court of appeals instructed the district court to make factual findings as to the amount of delay in caseworker assignment and reassignment at the time the injunction was issued. The district court made the requested findings based on written submissions from the parties and issued its opinion on July 25, 1990. (J.A. 28).

On October 29, 1990, a divided panel of the Seventh Circuit affirmed the district court's orders. (App. 1a). Judge Cummings' majority opinion, joined by Senior Judge Eschbach, held that the AAA's "reasonable efforts" clause, 42 U.S.C. § 671(a)(15), creates a federal right to reasonable efforts to prevent removal of children from their homes and to reunify children with their families. The court of appeals did not address the requirements for analyzing spending clause statutes set forth in *Pennhurst*. Instead, the court merely relied on *Wilder*'s result and found that a statute using the term "reasonable" and giving the states substantial discretion as to its implementation is not too vague to create enforceable rights. (App. 11a-12a). The court then looked to Illinois' own actions to define that term, which Congress left undefined in the AAA, and held that because Illinois uses caseworkers, it is "reasonable" to require prompt case assignment. (*Id.*).

Judge Manion filed a strong dissent, criticizing the panel majority for "inventing rights which interfere with the foster care system" (App. 27a), and for allowing a narrow focus on *Wilder*'s result to distract the court from "the more applicable legal standards and reasoning of *Pennhurst*." (App. 21a). The dissent warned that "[t]his opinion moves the court from its proper role

as impartial arbiter . . . to that of a crisis administrator of child welfare." (App. 29a-30a). Judge Manion recognized that by allowing any individual involved in the child welfare system to sue for "reasonable efforts," the majority vastly expanded federal court intervention into state child welfare decision making, opening the door to an "avalanche" of individual cases for which the federal courts are unprepared and ill-suited. (App. 29a). He predicted that the majority's holding will lead to "paralysis" of the child welfare system (App. 30a), a result inimical to the well-being of the children and families served by DCFS and child welfare agencies throughout the country.

SUMMARY OF ARGUMENT

Eleven years ago, Congress enacted the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-28, 670-79a, a federal-state cooperative funding statute, which, under Title IV-E of the Social Security Act, 42 U.S.C. §§ 670-79a, provides federal reimbursement to the States for certain costs of maintaining a child in foster care. In return for federal funds, the States agreed to file a plan with the Secretary of Health and Human Services meeting certain requirements, including providing that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." 42 U.S.C. § 671(a)(15). No further definition or explanation of what constitutes "reasonable efforts" is provided anywhere in the statute.

In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), this Court held that federal funding statutes like the AAA are in the nature of "contracts." *Id.* at 17. The very legitimacy of Congress' power to legislate under its spending authority "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Id.* Thus, if Congress wishes to impose

individually enforceable obligations on the States, Congress must express those rights clearly, so that the States may fully comprehend the contours of the bargain they enter when accepting federal funds. *Id.* at 17, 23-25. "The crucial inquiry . . . [is] whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Id.* at 25.

The *Pennhurst* progeny further explained that in order to create federal rights under Section 1983, a statutory provision intended to benefit a plaintiff must be both mandatory *and* not too vague and amorphous such that it is beyond the competence of the judiciary to enforce. *See, e.g.*, *Wilder v. Virginia Hosp. Assoc.*, 110 S. Ct. 2510, 2517 (1990); *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 431-32 (1987). As demonstrated by this Court's most recent ruling in *Wilder*, a court construing a federal funding statute must conduct a crucial inquiry into the context, statutory structure, legislative history, and regulatory framework in order to ascertain whether Congress has provided the necessary "objective benchmark" clearly defining the purported federal rights. *Wilder*, 110 S. Ct. at 2518-23. Thus, following a searching analysis, this Court in *Wilder* concluded that the Boren Amendment to the federal Medicaid Act provided medical facilities with a federal right to receive "reasonable and adequate" reimbursement rates from the States, as measured against the statutory benchmark of an "efficiently and economically operated facility" providing standard care with reasonable access for eligible persons. *Id.* at 2523.

The court below, however, conducted no such crucial inquiry and did not even acknowledge the clear statement principle under *Pennhurst.* Instead, the panel majority cursorily adopted the result in *Wilder*, holding simply that because *Wilder* found a federal right to "reasonable and adequate" reimbursement rates, there must also be a federal right to "reasonable efforts" to keep or return a child home. Nothing in *Wilder*, however, supports the proposition that a court construing a "reasonableness" provision

may avoid the searching analysis called for by *Pennhurst* and its progeny.

Indeed, an examination of the child welfare context in which the AAA was adopted reveals that the concept of "reasonable efforts" to maintain an abused or neglected child in his home or return that child to his home from foster care is only one of a number of possible theories. The "reasonable efforts" clause was enacted in reaction to concerns that placing children in foster care using a judicial standard based solely on the "best interests of the child" ignored parental interests and was contributing to the growth in the number of children in foster care. Although Congress created a fiscal incentive encouraging a policy of "reasonable efforts," Congress also intended that state courts make the determinations balancing the "best interests of the child" and "reasonable efforts" to keep the child at home, in the context of the individual circumstances and risks posed by each case. *See* 42 U.S.C. § 672(a). However, there was and is no consensus that the theory of "reasonable efforts" toward family preservation and reunification should predominate. In fact, state courts, including the Illinois Appellate Court earlier this year, have reaffirmed that the "best interests of the child" are paramount. In view of this context, it is unlikely that Congress intended in the bare term set forth in Section 671(a)(15) to elevate one approach, meaning "reasonable efforts" to family preservation or reunification, to a federal right.

This conclusion is reinforced by the statutory structure and legislative history of the AAA. It is apparent that Congress was aware of the sensitive and unpredictable nature of the individual circumstances in child abuse and neglect cases, and chose to rely on State authorities, who have greater expertise and experience in this area, to determine "*in each case*" whether "reasonable efforts" were made. *See* 42 U.S.C. § 672(a). *Cf. DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989). Instead of the "*objective* bench-

mark" required by this Court in *Wilder*, Congress in Section 671(a)(15) explicitly intended a *subjective* standard that has meaning only in the context of an individual child and his family.

The dangers inherent in ignoring the principles of *Pennhurst* are apparent in the ruling below. In the absence of a clear statement by Congress defining the federal rights that plaintiffs assert, the court of appeals looked to Illinois' own actions to determine what rights the "reasonable efforts" clause creates. (App. 11a). Because Illinois chooses to use caseworkers, the court held it is "reasonable" to require that Illinois assign caseworkers immediately and continuously in plaintiffs' cases. The court's method of analysis leads to the incongruous result that a single federal statute, the AAA, creates different individual federal rights in different states, based on each State's actions after the State accepts federal reimbursement. The court of appeals thus removed the linchpin of *Pennhurst*—that States must be able to ascertain the extent of their obligations at the time they accept federal funds.

Moreover, by holding that every child served by a state child welfare agency may sue the State in federal court to enforce his own idea of what is "reasonable," the court of appeals opens the federal courts to an "avalanche" of litigation challenging the minutiae of daily child welfare decision making in individual cases. (App. 29a (Manion, J., dissenting)). The decision below federalizes child welfare law and "moves the court from its proper role as impartial arbiter of cases and controversies under the law to that of a crisis administrator of child welfare." (*Id.* at 29a-30a).

Finally, although this action and the AAA seek to promote improvements in State child welfare services, the likely result will be quite the opposite. Under the lower court's rubric, it is unlikely that States will create greater exposure for themselves by instituting new or innovative programs that may become federally en-

forceable rights under the "reasonable efforts" clause. Furthermore, the resulting litigation will lead to "considerable paralysis because any efforts deemed unreasonable by scrutinizing plaintiffs and courts could cease, resulting in no remedial efforts while litigation continues in situations where something must be done." (App. 30a (Manion, J., dissenting)).

Even if a federal right to "reasonable efforts" exists, Congress nonetheless has foreclosed enforcement of such a right under Section 1983. The AAA itself provides that State courts are to determine whether "reasonable efforts" have been made "in each case," in the context of the child's welfare and whether the child should remain at home. 42 U.S.C. § 672(a). In addition, Congress has provided for a case plan and case review process and a fair hearing procedure for individuals, in addition to the enforcement powers accorded the Secretary under the Act. 42 U.S.C. §§ 671(a)(15), 675(1), (5), (6).

The court of appeals compounded its error by holding that Section 671(a)(15) also is enforceable through an implied private right of action under the standard of *Cort v. Ash*, 422 U.S. 66, 78 (1975). As with the closely related Section 1983 analysis above, congressional intent is the most important factor in determining whether to infer a right of action from congressional silence. *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979). Plaintiffs cannot possibly meet their heavy burden of showing that Congress intended to allow individual enforcement of Section 671(a)(15), when such enforcement is inconsistent with the language, structure, and legislative history of the statute.

The virtually boundless scope of the holding below is further evidenced by the fact that Title IV-E of the AAA, which by its terms provides no federal reimbursement for services to children living at home, nonetheless creates an enforceable right to "reasonable efforts" on behalf such children. By that holding, the

Seventh Circuit eliminated yet another clear requirement of *Pennhurst*—that Congress does not create federal rights without providing federal dollars to offset a "substantial" portion of the cost. *See Pennhurst*, 451 U.S. at 24.

This Court concluded its analysis of federal statutory rights in *Pennhurst* by observing: "In no case . . . have we required a State to provide money to plaintiffs much less required a State to take on such open-ended and potentially burdensome obligations as providing 'appropriate' treatment in the 'least restrictive' environment." *Pennhurst*, 451 U.S. at 29. The federal rights created by the opinion below are as much, if not more, open-ended and potentially burdensome as those rejected by this Court in *Pennhurst*. This Court should reaffirm the tenets of *Pennhurst* and reverse the decision of the court below.

ARGUMENT

I.

THE AAA'S VAGUE "REASONABLE EFFORTS" CLAUSE DOES NOT CREATE ENFORCEABLE RIGHTS UNDER SECTION 1983

In *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980), this Court held that Section 1983 provides a cause of action for violations of federal statutes as well as the Constitution. The Court, however, has recognized that a Section 1983 action will not lie where "(1) 'the statute [does] not create enforceable rights, privileges, or immunities within the meaning of § 1983,' or (2) 'Congress has foreclosed such enforcement of the statute in the enactment itself.' " *Wilder*, 110 S. Ct. at 2517 (quoting *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 423 (1987)). Under this two-step inquiry, the plaintiffs must first assert the existence of federal rights that have been violated. *Golden State Transit Corp. v. City of Los Angeles*, 110 S. Ct. 444, 448 (1989). Then, the defendants may show that even though a federal right exists,

Congress nonetheless " 'specifically foreclosed a remedy under § 1983,' by providing a 'comprehensive enforcement mechanis[m] for protection of a federal right.' " *Id.* (quoting *Smith v. Robinson*, 468 U.S. 992, 1003, 1005, n.9 (1984)).

Here, the court of appeals held that Section 671(a)(15) of the AAA creates individually enforceable federal rights to "reasonable efforts" to keep or return a child home. In so holding, the court misapplied the controlling precedent of this Court and disregarded the purpose, structure, and context of the AAA (Part A below).[5] Moreover, the court of appeals held that Congress had not specifically foreclosed a Section 1983 remedy, despite the provisions in the AAA deferring to state judicial proceedings (Part B below).

A. Congress Did Not Create A Clearly-Defined Federal Right To "Reasonable Efforts" In Each Case To Keep Or Return A Child Home

In *Pennhurst*, 451 U.S. at 17, this Court held that a federal-state cooperative funding statute, such as the AAA, is "in the

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[5]Prior to the decision below, the district courts within the Seventh Circuit were divided on this question. *Compare B.H. v. Johnson*, 715 F. Supp. 1387, 1401-02 (N.D. Ill. 1989) (Grady, C.J.) ("reasonable efforts" clause too "amorphous" to create enforceable rights) *and Aristotle P. v. Johnson*, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989) (Williams, J.) (same) *with Norman v. Johnson*, 739 F. Supp. 1182, 1187 (N.D. Ill. 1990) (Hart, J.) ("reasonable efforts" clause creates enforceable rights) *and Artist M.*, App. 32a (N.D. Ill. 1989) (same).

That split was reflected in other circuits as well. *Compare In re Scott County Master Docket*, 672 F. Supp. 1152, 1202-03 (D. Minn. 1987) ("reasonable efforts" clause does not create enforceable rights), *aff'd sub nom. Myers v. Scott County*, 868 F.2d 1017 (8th Cir. 1989) (adopting district court opinion and analysis) *and Scrivner v. Andrews*, 816 F.2d 261, 263 (6th Cir. 1987) (AAA creates no right to meaningful visitation) *and Winston v. Children & Youth Servs.*, 748 F. Supp. 1128, 1133 (E.D. Pa. 1990) ("reasonable efforts" clause does not create enforceable right to parent-child visitation) *with R.C. v. Hornsby*, No. 88 D-1170-N, slip op. (M.D. Ala. Apr. 19, 1989) ("reasonable efforts" clause creates enforceable rights).

nature of a contract." The very legitimacy of Congress' authority to create federal rights in a spending clause statute "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Id.* As this Court explained:

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress *speak with a clear voice*, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id. (citations omitted) (emphasis added). "The *crucial inquiry* . . . [is] whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Id.* at 25 (emphasis added).

In *Pennhurst*'s progeny, this Court explained that the clear statement required by *Pennhurst* is satisfied only where a provision intended to benefit the plaintiff is (i) mandatory, and (ii) the interest asserted by the plaintiff is not " 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce.' " *Golden State Transit Corp.*, 110 S. Ct. at 448 (quoting *Wright*, 479 U.S. at 431-32), *quoted in Wilder*, 110 S. Ct. at 2517. This Court also made plain that the crucial inquiry mandated by *Pennhurst* consists of an examination of the context of the statute, the statutory structure and language, the legislative history, and the regulations promulgated under the statute. *Wilder*, 110 S. Ct. at 2518-23; *see also Wright*, 479 U.S. at 433-35 (O'Connor, J., dissenting).

Notwithstanding this well-established precedent, the court below rejected *Pennhurst* on grounds wholly irrelevant to this case and failed to apply the necessary clear statement principle. Indeed, the court engaged in virtually no inquiry at all into the context, structure, and history of the AAA, let alone the crucial inquiry required by this Court. This omission is fatal to the

court's holding, for an examination of Section 671(a)(15) and the AAA compels the conclusion that Congress did not create a federal right to "reasonable efforts" to keep or return a child home. To rule otherwise, as the court of appeals did, is to open the federal courthouse door to an avalanche of individual actions challenging the case-by-case decisions of state child welfare authorities. Congress could not have intended such a result, which federalizes child welfare decision making—an area this Court repeatedly has recognized is uniquely within the ambit of the States—and if it had such an intent, Congress was required to more clearly and definitely say so.

1. The Court Below Failed To Follow The Standard And Analysis Required By *Pennhurst*

The court of appeals failed even to acknowledge the *Pennhurst* requirement of a clear statement creating a federal right. The court never conducted the crucial inquiry into congressional intent required by that case. Instead, the panel majority distinguished *Pennhurst* in a single paragraph, suggesting that *Pennhurst* is inapposite because the "reasonable efforts" clause is "tied indisputably to the funding provision" of the AAA, in contrast to the asserted right to "least restrictive" placements in *Pennhurst*. (App. 11a). Yet that argument goes only to whether Section 671(a)(15) is mandatory, a point not at issue in this case. *Pennhurst* also requires that Congress speak clearly when defining new federal rights.

Thus, this Court rejected the plaintiffs' claim in *Pennhurst* that the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6010, created a federal right to "appropriate treatment" in the "least restrictive setting." The Court found such an obligation on the States to be "largely indeterminate," requiring the application of the clear statement standard with "greatest force." *Id.* However, the Court found no such clear statement by Congress, holding that "[i]t is difficult to know what

is meant by providing 'appropriate treatment' in the 'least restrictive' setting, and it is unlikely that a State would have accepted federal funds had it known it would be bound to provide such treatment." *Id.* at 24-25.

Likewise, in *Wilder* last year this Court carefully conducted the crucial inquiry required by *Pennhurst* to determine whether the Boren Amendment to the Medicaid Act, 42 U.S.C. § 1396a(a)(13)(A), created an enforceable right under Section 1983. The Boren Amendment required that to receive federal Medicaid funds, a State must have a plan that provides for the payment of rates to medical facilities that the State finds are "reasonable and adequate." The Court held this provision to be "cast in mandatory rather than precatory terms," 110 S. Ct. at 2519, yet its analysis did not stop there. The Court also conducted a searching and detailed review of the context, statutory structure, legislative history, and regulatory framework of the Boren Amendment before concluding that Congress had intended to establish an enforceable right. Congress clearly defined this right by linking "reasonable and adequate" rates to an "objective benchmark." This "benchmark" consisted of statutory and regulatory factors to be used in calculating the reasonableness of such rates, including the specific statutory requirement that such rates be measured against the costs of "an efficiently and economically operated facility" providing standard care and reasonable access to eligible participants.[6] 110 S. Ct. at 2522-23. Moreover, the

[6]Similarly, in *Wright*, 479 U.S. 418, this Court found that the Brooke Amendment to the Housing Act of 1937, 42 U.S.C. § 1437a, created an enforceable right under Section 1983 to a "reasonable" rent allowance for utilities in public housing projects. In so holding, the Court reviewed the legislative history, statutory structure, and regulations implementing the Brooke Amendment. *Id.* at 430-32, 424-30. In particular, the Court found the statute limited rent amounts to an objective benchmark of no more than 30 percent of the tenants' income, and federal regulations specifically defined the "statutory concept of 'rent,' " and set forth guidelines for local authorities to follow in determining utility allowances. *Id.* at 431-32.

context and legislative history of the Boren Amendment evidenced an understanding by both Congress and the States that health care providers such as the *Wilder* plaintiffs had a federal right to enforce reasonable reimbursement rates.[7] *Id.* at 2521-22.

In contrast, the panel majority below conducted no inquiry, let alone the requisite crucial inquiry, into the structure and circumstances surrounding congressional enactment of the AAA. With a cursory discussion, the court below merely applied the result in *Wilder*, despite the material differences in context, statutory structure, legislative history, and regulatory framework, as set forth in Part I.A.2 below. As Judge Manion aptly noted in dissent, "the judicial treatment of the 'reasonableness' language found in *Wilder* and *Wright* should have no bearing on this case." (App. 24a). Contrary to the majority's suggestion, *Wilder* does not stand for the proposition that any statute using the term "reasonable" or "adequate" by definition creates enforceable rights.

As applied by the panel majority, *Wilder* eliminates the requirements under *Pennhurst* that Congress must speak with a clear voice when it intends to impose federal rights on the States

[7]The four dissenting Justices in *Wilder*, led by Chief Justice Rehnquist, would find that the statutory structure of the Boren Amendment shows that it merely requires a state plan, filed with the Secretary, with specified procedural findings and assurances by the State as to the reasonableness of its rates. *Wilder*, 110 S. Ct. at 2526-27 (Rehnquist, C.J., dissenting, joined by O'Connor, Scalia, and Kennedy, JJ.). To the extent the provision creates any enforceable rights at all, the dissenters argued, it creates a right only to have the plan filed and reviewed by the Secretary in accordance with the statute. *Id.* Section 671(a) of the AAA also merely requires that the State file a written plan with the Secretary. 42 U.S.C. § 671(a). Thus, this case presents an appropriate opportunity for the Court to reconsider the precise scope of its holding in *Wilder*, although such reconsideration is not necessary for a ruling that the "reasonable efforts" clause under the AAA does not create a federal right.

and that federal courts must closely inquire as to the indicia of that intent. Instead, the opinion below would find a federal right in any "reasonable efforts" or "best efforts" requirement, without reference to the objective benchmark or clear statement required by this Court.[8] As a result, new judicially-created rights will be imposed on the States without their voluntary and knowing acceptance. This outcome is contrary to the very "legitimacy of Congress' power to legislate under the spending power." *Pennhurst*, 451 U.S. at 17.

2. The AAA's Context, Structure, Legislative History, And Regulatory Scheme Demonstrate That Section 671(a)(15) Does Not Create A Federal Right

Instead of a mere analogy to the result in *Wilder*, *Pennhurst* requires a crucial inquiry into the circumstances underlying Congress' "unambiguous[ ]" intent to "impose a condition on the grant of federal moneys." *Pennhurst*, 451 U.S. at 17. This process, reaffirmed in *Wilder*, begins with "the context of the entire statute," and includes the statutory language and structure, legislative history and regulatory framework of the provision in question. *Wilder*, 110 S. Ct. at 2518-23.

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[8]The court of appeals relied heavily on the district court's notion that the "reasonable efforts" clause in the AAA was not too vague to be judicially enforceable because "[c]ourts have long proved themselves adequate to the task of enforcing contractual 'best efforts' obligations, and they equally regularly enforce commitments of parties to conduct themselves 'reasonably.' " (App. 11a (quoting App. 39a)). The question under *Pennhurst*, however, is not how reasonable efforts clauses generally are interpreted under contract law, but rather how Congress intended *this* "reasonable efforts" clause to be interpreted. Moreover, even in contract law, a court may find a "best efforts" clause to be too vague to be enforced where there are "no objective criteria against which either [party's] efforts can be measured." *Pinnacle Books, Inc. v. Harlequin Enters.*, 519 F. Supp. 118, 121 (S.D.N.Y. 1981) ("Essential to the enforcement of a 'best efforts' clause is a clear set of guidelines against which the parties' 'best efforts' may be measured.").

(a) There is no indication that Congress meant to create a federal right to one of many competing theoretical approaches to the complex problems of foster care

In *Wilder*, this Court held that courts must review the "entire context" of a federal funding statute in deciding whether Congress intended to create new enforceable rights. 110 S. Ct. at 2518. The "context" of Section 671(a)(15) differs radically from that of cases in which the Court has found enforceable rights.

Both *Wilder*, 110 S. Ct. 2510, and *Wright*, 479 U.S. 418, involved *monetary* calculations easily determined based on prevailing rates in the market. *Wilder* concerned a challenge to Medicaid reimbursement rates, while *Wright* found an enforceable right to a reasonable rent allowance. In both instances market rates, in addition to the objective benchmarks set forth in the statutes themselves, provided guidance as to what rate was "reasonable."[9]

By contrast, there is no market for "reasonable efforts" to keep or return a child home, and such "reasonable efforts" cannot be calculated or quantified. As the dissenting judge below stated:

> The disputed "reasonable efforts" clause of the AAA allows no such precision. The "reasonable efforts" clause creates no specific mandate to the DCFS. Therefore there is nothing for the court to determine as being reasonable or unreasonable. Rather than concentrating on the "reasonableness" of a particular governmental activity, § 671(a)(15) relates to the *overall* reasonableness of *every* aspect of the foster care program. This significantly distinguishes the present case from *Wilder* and *Wright*. . . . A state's duty to exert "reasonable efforts" in general does not suggest any particular obligation.

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[9]Similarly, *every* case in which this Court has found that provisions of the Social Security Act created enforceable rights under Section 1983 involved direct, easily calculated, monetary benefits. *See Wilder*, 110 S. Ct. 2510 (Medicaid reimbursement); *Maine v. Thiboutot*, 448 U.S. 1 (denial of AFDC monetary benefits for stepchildren); *Miller v. Youakim*, 440 U.S. 125 (1979) (AFDC benefits); *Rosado v. Wyman*, 397 U.S. 397 (1970) (reduction of AFDC benefits); *King v. Smith*, 392 U.S. 309 (1968) (same).

(App. 24a (Manion, J., dissenting) (emphasis added)). Therefore, "the Act gives a general directive that is much too broad to give a federal judge a proper gauge from which to measure reasonable efforts." (*Id.* at 25a).

Congress framed this general directive as part of its effort to "lessen the emphasis on foster care placement and . . . *encourage* greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes." (App. 6a (quoting S. Rep. No. 336, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. Code Cong. & Admin. News 1448, 1450) (emphasis added)). Thus, Congress expressed its encouragement, even preference, for a policy of family reunification and preservation, but "a congressional preference for certain kinds of treatment" is simply "too thin a reed to support the rights and obligations" created by the court below. *Pennhurst,* 451 U.S. at 19.

Indeed, in the child welfare context of the AAA, the "reasonable efforts" clause represents but one theory or approach to the problems of foster care. There is no indication that Congress intended not only to express a preference for one such theory but also to elevate it to the status of a federal right. *See, e.g.,* M. Wald, J. M. Carlsmith & P. H. Leiderman, *Protecting Abused and Neglected Children* 2 (1988) (discussing the AAA and noting that the "substantial changes in public policy that took place in the 1970's were based more on ideological and fiscal considerations than on evidence about the impact of various types of interventions on the development of abused and neglected children"); Garrison, *Child Welfare Decision Making: In Search of the Least Drastic Alternative,* 75 Georgetown L.J. 1745, 1759-60 (1987) (describing the AAA as the result of reforms initiated by proponents of the "new philosophy" of "minimum [state] intervention" in child welfare). One review of foster care prevention programs in place at the time the AAA was enacted concluded that despite

the "[c]onsiderable efforts" during the prior decade to develop program models to keep children in their own homes, no models had marked success in reducing such placements. Magura, *Are Services to Prevent Foster Care Effective?,* 3 Children and Youth Services Review 193, 207 (1981).[10]

The concept of a showing of "reasonable efforts" to preserve the family prior to removing a child from his home arose in part because of dissatisfaction with the judicial standard of "best interests of the child." By focusing solely on the "best interests" of an abused or neglected child, critics charged that parental interests were ignored and children were placed in foster care who might otherwise remain at home if some services were provided. Mnookin, *Foster Care—In Whose Best Interest?,* 43 Harv. Educ. Rev. 599, 613-627 (1973).[11]

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[10]This study observed that:

> [I]f placement is a highly situational and thus often unpredictable event, or if some placements can be avoided only at great per capita expense—conclusions compatible with the results of the studies examined—then perhaps a different approach to preventive services is required. Devoting disproportionate amounts of time and effort to the uncertain prevention of some placements may inevitably short-change the majority of children referred to protective services who lack adequate nurturing and could benefit from additional casework.

Id. Some more recent studies appear to reach similar conclusions that a uniform judgment cannot be made that placement prevention programs keeping a child at home are in all cases better than foster care. *See* M. Wald, J. M. Carlsmith & P. H. Leiderman, *supra,* at 185 (comparative study of children in foster care and children at home in family preservation programs concludes "[i]n sum, although there was relatively little major change among the children in either group, there is some indication that foster care was more beneficial to the children most at risk"); Garrison, *supra,* at 1802 (citing significant problems with family preservation programs and concluding that "[b]ecause of these disadvantages of in-home intervention, I find it difficult to agree with other minimum intervention theorists who urge that in-home services should presumptively be preferred to placement.").

[11]*See also,* Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 Law and Contemporary Problems 226,

(Footnote continued)

These criticisms were referred to by Congress in its consideration of the AAA, 125 Cong. Rec. 22681 (1979) (statement of Sen. Cranston upon introduction of Senate bill that resulted in the AAA), and led to the adoption of Section 671(a)(15). Section 671(a), however, does not also include any reference to the "best interests of the child" or any similar standard.

The following provision, Section 672(a)(1), does include a requirement that in order to receive Title IV-E funds, a foster care placement must be the result of a judicial determination that continuation at home "would be contrary to the welfare of such child and that reasonable efforts of the type described in Section [6]71(a)(15) have been made." 42 U.S.C. § 672(a)(1) (parenthetical omitted). This term was included in response to the "best interests" critics in order to provide an incentive to the States to weigh both the child's welfare and parents' interests before making foster care placements. S. Rep. No. 336, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. Code Cong. Admin. News 1448, 1464-65. The legislative history makes clear, however, that the judicial determinations weighing these competing interests were to be made by "the judiciaries of the States." *Id.* at 1465; *see also* Part I.A.2.(b) below. Thus, Congress could not have intended in Section 671(a)(15) to render a nullity Section 672(a)'s state court

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(Footnote 11 continued from previous page)
240-49, 272-81 (1975) (suggesting instead of "best interests of the child" a standard requiring a showing that there are "no reasonable means" to protect the child's health without removing the child from home); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights,* 28 Stanford L. Rev. 623 (1976). Another alternative to the "best interests of the child" suggested at the time was a standard based on the "least detrimental available alternative for safeguarding the child's growth and development." J. Goldstein, A. Freud, A. Solnit, *Beyond the Best Interests of the Child* 53 (1973); *see also* Mnookin, *Child Custody Adjudication, supra,* at 248; Garrison, *supra,* at 1762-66, 1825 (criticizing Goldstein, Freud, and Solnit standard). *Cf. In re Angelia P.,* 28 Cal. 3d 908, 916-17, 623 P.2d 198, 202, 171 Cal. Rptr. 637, 641-42 (1981) (discussing "the evolving 'parental preference' and 'child's best interests' standards").

balancing of "best interests" and "reasonable efforts" by creating a federal right to "reasonable efforts" alone.

The debate between the "best interests of the child" and "reasonable efforts" to family reunification or preservation continues to this day in the state juvenile courts. *Compare In re Welfare of J.J.B.*, 390 N.W.2d 274, 278-80 (Minn. 1986) (discussing the "major philosophical concepts" of the AAA and adopting the "best interest of the child standard as a paramount consideration" in temporary or permanent placement procedures) *and In re Edward C.*, 126 Cal. App. 3d 193, 206, 178 Cal. Rptr. 694, 701 (1981) (refusing to order detailed reunification plan that would have been "futile" because, although legislature was concerned with family relationships, legislature did not intend "a mechanical approach to a reunification plan for a family. Such a plan must be appropriate for each family and be based on the unique facts relating to the family.") *and In re C.L.M.*, 625 S.W.2d 613, 617 (Mo. 1981) ("[i]n any proceeding involving child custody the overriding consideration is the welfare of the child") *with In re Kirk Stewart*, No. CA-3075, slip op. (Ohio App. Feb. 27, 1985) ("best interests of the child" no longer paramount and may receive less consideration than judging efforts at reunification).

The Illinois Appellate Court recently has held that in all guardianship and custody cases, "the issue that singly must be decided is the best interest of the child." *In re Ashley K.*, 212 Ill. App. 3d 849, 879, 571 N.E.2d 905, 923 (1991).[12] In reversing the juvenile court's decision attempting to balance the interests of the child's parents in reunification with the interests of a child who had been in foster care for five years, the appellate court, despite recognizing the AAA's reunification aim, *id.* at 871, 571 N.E.2d at 918, held that:

> A child's best interest is not part of an equation. It is not to be balanced against any other interest. In custody cases, a child's best interest is and must remain inviolate and impreg-

[12]The appeal in *Ashley K.* was filed by counsel for plaintiffs in this case.

> nable from all other factors, including the interests of the biological parents.

Id. at 879, 571 N.E.2d at 923.[13] *See also In re Violetta B.*, 210 Ill. App. 3d 521, 534, 568 N.E.2d 1345, 1353 (1991) ("best interest of the child" should control placement decision when child is removed from home).

If upheld, the opinion below will create a federal right to "reasonable efforts" to family reunification and preservation that will place the federal courts in direct conflict with these state court rulings. There is no indication that Congress intended this level of interference with State decision making; to the contrary Congress intended to defer to the States, as evidenced by Section 672(a). Clearly, in the context of competing child welfare theories, Congress did not choose to single out one such theory and make it a federal right.[14]

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[13]The *Ashley K.* decision (referred to in the press as the "Sarah" case) has highlighted the tension between "reasonable efforts" to keep an abused or neglected child at home and the child's best interests. *See, e.g.*, Gratteau, *When Do Bad Parents Lose Rights?*, Chicago Tribune, Apr. 21, 1991, at 1, col. 1. This article notes that "[a]t the core of the controversy over the state of child welfare is the concept of family reunification," and quotes plaintiffs' counsel as observing that " 'judges and DCFS are working under the assumption that there are no bad biological parents.' " *Id.* at 12, col. 1-2. *See also* Murphy, *New DCFS Report Leaves Kids in the Cold*, Chicago Sun-Times, Feb. 2, 1991, at 12 (criticizing report recommending that DCFS devote more resources to reunification and placement prevention rather than to developing institutions for long-term placement). One child welfare advocate noted in the Chicago Tribune that "[w]e have these wide mood swings or fads. At one time, we're placing everybody. Then, we're reunifying everybody. We zig and we zag with no particular reason. We need a wide range of options so that people can make Solomon-like decisions." Gratteau, *supra*, at 12, col. 6 (quoting Peter W. Forsythe, Director, Edna McConnell Clark Foundation program for children).

[14]It is especially unlikely that Congress would preempt State decision making in light of the traditional deference accorded the States in matters of child welfare and family law. *See Thompson v. Thompson*, 484 U.S. 174, 186 (1988) (federal courts have "little expertise to resolve"

(Footnote continued)

(b) Instead of an objective benchmark the statutory structure and language of the AAA make plain that "reasonable efforts" can only be determined subjectively in "each case"

All nine Justices agreed in *Wilder* that the starting point in determining whether a statute creates enforceable rights is the statute itself. *See Wilder*, 110 S. Ct. at 2517-18; *id.* at 2526 (Rehnquist, C.J., dissenting). The AAA's structure clearly demonstrates that Congress recognized and intended that the concept of "reasonable efforts" to keep or return an abused or neglected child home has meaning *only* in the subjective context of a given individual case.

Section 671(a)(15) of the AAA stands in stark contrast to the Boren Amendment construed in *Wilder*. The "reasonable efforts" clause here states only that in order to receive Title IV-E funds, a State must have an approved plan which

> (15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

42 U.S.C. § 671(a)(15).

(Footnote 34 continued from previous page)
family law disputes); *Moore v. Sims*, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern."); *United States v. Yazell*, 382 U.S. 341, 352 (1966) ("Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements."); *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) ("[t]he whole subject of the domestic relations of husband and wife, parent and child," is relegated to the states). As one court has admonished, the federal courts should not be injected

> into an area in which they have little knowledge or experience: that of child welfare. Balancing the rights of parents with those of their children is a task as difficult as it is delicate, and we doubt that it will be performed better under the eyes of federal courts . . . than by the state judicial and administrative authorities.

DeShaney, 812 F.2d at 304.

By comparison, the Boren Amendment requires that States have a Medicaid plan providing for the payment to medical facilities

> through the use of rates (determined in accordance with methods and standards developed by the State . . .) *which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities* in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access . . . to inpatient hospital services of adequate quality. 42 U.S.C. § 1396a(a)(13)(A) (1982 ed., Supp. V) (emphasis added).

Wilder, 110 S. Ct. at 2514.

Obviously, the Boren Amendment, unlike the "reasonable efforts" clause, explicitly sets forth the context and standards by which "reasonable and adequate" rates are to be measured, including the nature of the medical facility ("efficiently and economically operated"), the level of care provided ("in conformity with applicable State and Federal laws, regulations, and quality and safety standards"), and for which population with what frequency ("individuals eligible for medical assistance" with "reasonable access" to adequate inpatient services).[15] Based on this

[15]In their Brief in Opposition to the Petition, plaintiffs assert that the *Wilder* Court also held enforceable the "reasonable access" portion of the Boren Amendment. (Brief in Opposition at 24). However, the *Wilder* plaintiffs were not Medicaid recipients seeking "reasonable access" to medical services; they were medical providers seeking reimbursement for providing those services. Therefore, this Court was not presented with, and did not reach, the question whether an individual Medicaid recipient could sue the State for failure to provide "reasonable access" to medical facilities. Instead, the "reasonable access" term of the Amendment, like the "efficiently and economically operated facilities" term, merely serves to make the definition of "reasonable and adequate" rates more precise. *See Wilder*, 110 S. Ct. at 2523.

extensive language, this Court found that the Boren Amendment provided an "objective benchmark" to judge the reasonableness of a State's Medicaid rates. *Id.* at 2522-23.

Nothing remotely approaching an "objective benchmark" is set forth in the AAA. Indeed, instead of an *objective* benchmark, the "reasonable efforts" clause contains the *subjective* requirement that "reasonable efforts" be determined "*in each case*." Thus, Congress recognized and intended that in the highly charged and emotional area of child welfare, the determination as to what, if any, efforts are reasonable to keep or return an abused or neglected child home must be measured against the unique circumstances and interests of each child and his parents. As the dissent below noted, "Since every case will be different, 'reasonable efforts' cannot be expected to be the same." (App. 27a (Manion, J., dissenting)). Thus, the "reasonable efforts" clause by its terms, unlike the Boren Amendment, precludes reference to any generalized objective benchmark.[16]

The highly individualized nature of the "reasonable efforts" determination is underscored by Section 672(a), which requires

[16]Indeed, the district court in this case recognized that under *Pennhurst*, a "case-by-case personalized determination with no definable standard" could not give rise to an enforceable right under Section 1983. (12/7/89 Tr. at 5). The court attempted to distinguish the "reasonable efforts" clause by misreading Section 671(a) as requiring that States have a *system* in place to provide "reasonable efforts" instead of a "plan." (*Id.* at 6-8). (*See* Brief in Opposition at 36 (adopting the district court's reasoning)). Even if the district court's systemic limitation on Section 671(a)(15) had some basis in the statute, the courts below erred by examining a single aspect of the DCFS system, namely the case assignment process. If the AAA requires an overall system, then the determination whether DCFS meets that requirement must entail an examination of the Department's *entire* system, or the entire plan filed with the Secretary. Piecemeal challenges to isolated aspects of that system will lead to the creation of innumerable rights, such as the right to continuous assignment of a caseworker asserted by plaintiffs here, which bear little or no relationship to the AAA's specific requirements.

that in order to be eligible for federal reimbursement a child must be removed from his home as "the result of a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and (effective October 1, 1983) that reasonable efforts of the type described in Section [6]71(a)(15) have been made." 42 U.S.C. § 672(a)(1). The judicial determination required by Congress in Section 672(a) is an individual one taking into account the "welfare of *such* child," the "effect of continuation" in the child's home, and the "reasonable efforts" made. The concept of "reasonable efforts," isolated in Section 671(a)(15), has no other objective meaning or benchmark and cannot have been intended to create a federal right in isolation. *See* Part I.A.2.(a) above.[17]

When Congress chose to define terms contained in Section 671(a), it proved capable of doing so. *See Pennhurst*, 451 U.S. at 23 (contrasting 42 U.S.C. § 6010 with other more definite sections of the same statute and noting that "[w]hen Congress intended to impose conditions on the grant of federal funds . . . it proved capable of doing so."). Although there is no definition anywhere in the AAA of Section 671(a)(15), Congress set out specific, detailed definitions of the "case plan" and "case review system"

[17]The requirement in Section 672(a) of an individualized judicial determination of "reasonable efforts" to keep or return a child home does not mean the clause has been sufficiently defined by Congress to be "judicially enforceable." *Wilder*, 110 S. Ct. at 2522. To the contrary, Section 672(a) makes clear Congress' understanding that the reasonableness of any efforts to keep a child at home with abusive or neglectful parents may be judged only against *that child's* unique circumstances, welfare and risk of harm. The substantial discretion accorded the States in the AAA is not to develop an overall rate methodology, as in *Wilder*, but to evaluate each individual child's case on its unique facts. Similarly, contrary to plaintiffs' suggestion, the fact that Illinois has amended its state laws to include the individualized "reasonable efforts" determinations required by Section 672(a) does not create any objective definition of "reasonable efforts." (Brief in Opposition at 24-25). In any event, such definition under *Pennhurst* must be provided by Congress, not an individual State.

required under Section 671(a)(16).[18] *See* 42 U.S.C. § 675(1), (5) (captioned "Definitions").

Finally, the federal funding mechanism of Title IV-E reinforces the conclusion that Congress did not intend to create a federal right to "reasonable efforts." While the States receive federal funds under Title IV-E for certain foster care costs, no federal funds are provided under Title IV-E for services to make "reasonable efforts" to preserve or reunite a family.[19] As this Court held in *Pennhurst,* "[w]hen Congress does impose affirmative ob-

[18]Plaintiffs' Complaint originally included claims based on Sections 671(a)(9) and 671(a)(16) in addition to 671(a)(15). In ruling on defendants' motion to reconsider the court's decision denying defendants' motion to dismiss, the district court informed the parties that the sole remaining claim was that raised under Section 671(a)(15). (12/7/89 Tr. at 2-3).

The district court clearly was correct in dismissing claims under Sections 671(a)(9) and 671(a)(16). Section 671(a)(9) requires only that the state report "known or suspected" cases of abuse to appropriate authorities; it nowhere imposes an affirmative obligation to seek out unknown or unsuspected abuse. Only the latter "right" could possibly support the right to continuous assignment of a caseworker asserted by plaintiffs. Similarly, if Section 671(a)(16) creates a right to case plans and case reviews, that right cannot be transformed into a right to immediate and continuous assignment of a caseworker. The AAA requires only that DCFS draft a case plan within *60 days* after DCFS takes custody of a child, 45 C.F.R. § 1356.21(d)(2), and conduct case reviews every *six months*, 42 U.S.C. § 675(5)(B). Plaintiffs have not alleged, and could not allege, a systemic failure to assign caseworkers for such lengthy periods. By contrast, in *Lynch v. Dukakis*, 719 F. 2d 504 (1st Cir. 1983), the court imposed a 24-hour case assignment requirement only after finding that the state had failed utterly to satisfy the procedural requirements of Section 671(a)(16).

[19]Title IV-E, 42 U.S.C. §§ 670-79a, the portion of the AAA containing Section 671(a)(15), reimburses the states for the costs of maintaining a child in foster care, *see* §§ 670, 672, which are defined in the Act as "payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation." § 675(4).

ligations on the States, it usually makes a far more substantial contribution to defray costs." *Pennhurst*, 451 U.S. at 24.[20]

(c) The AAA's legislative history further evinces Congress' intent to leave decisions in individual cases to the States

In the legislative history Congress made clear its desire to defer to the States and experienced child welfare administrators in the application of the AAA in general and the "reasonable efforts" clause in particular. In contrast, in *Wilder*, the Court relied heavily on the legislative history demonstrating congressional intent to allow medical providers private enforcement rights under the Medicaid Act. *See Wilder*, 110 S. Ct. at 2521-22.[21]

The House Ways and Means Committee Report on the AAA specifically states:

> [T]he Committee recognizes that the preventive services requirement would be inappropriate in certain specific circumstances. This would be the case where the home situation

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[20]In the absence of Title IV-E funds for services to provide "reasonable efforts," the practical outcome of a ruling nonetheless creating a federal right to such efforts ironically could result in States abandoning the AAA and its goals altogether. A series of federal judicial orders mandating sweeping services to provide "reasonable efforts" could prove to be more costly to the States than the foster care maintenance payments received from the federal government. In that event, the States may well determine that the liability associated with participation in the "cooperative" federal-state program under the AAA outweighs the financial benefits. *Cf.* Magura, *supra*, at 208 (raising concerns as to potentially high per capita cost of family preservation programs).

[21]Congress enacted the Boren Amendment in 1980 to change the Medicaid reimbursement standard for nursing and intermediate care facilities, and one year later extended the Amendment to hospitals. *See Wilder*, 110 S. Ct. at 2513 n.2 (citations omitted). Congress enacted the Amendment out of a concern that the federal government was wielding too much control over reimbursement rates, leading to rapidly escalating Medicaid costs. *Id.* at 2515. While Congress intended to give the states more flexibility in setting rates, the Medicaid Act's history contains *explicit* statements that Congress intended that providers retain a cause of action for injunctive relief. *Id.* at 2521-22. The Court relied heavily on those statements in finding that the Boren Amendment creates enforceable rights. *Id.*

> presents a substantial and immediate danger to a child which would not be mitigated by the provision of preventive services. . . .
>
> The Committee recognizes that the entire array of possible preventive services are not appropriate in all situations. *The decision as to the appropriateness of specific services in specific situations will have to be made by the administering agency having immediate responsibility for the care of the child.*

H.R. Rep. No. 96-136, 96th Cong., 1st Sess. 47 (1979) (emphasis added). Congress thus chose not to define "reasonable efforts" or otherwise tie that requirement to an "objective benchmark."

Indeed, the need for flexibility and deference to the states with respect to day-to-day decisions in child abuse and neglect cases is evident throughout the AAA's legislative history. *See, e.g.*, S. Rep. No. 336, 96th Cong., 2d Sess. 1, 16, *reprinted in* 1980 U.S. Code Cong. & Admin. News 1448, 1466 (recognizing that progress in restructuring foster care system "cannot be achieved by 'Federal fiat,' " but only through state governments "which have primary responsibility" for these programs); 125 Cong. Rec. 22685 (1979) (remarks of Sen. Cranston)[22] (Congress intended to "leav[e] to the discretion of the States the precise mechanisms for protecting the rights of persons in the foster-care system"); 125 Cong. Rec. 22692 (1979) (remarks by Sen. Moynihan) ("Insofar as it is within the limited abilities of the Federal Government to encourage the return of youngsters to their homes or their adoption, our policies should be so shaped").

(d) The AAA's implementing regulations provide no guidance as to what efforts are "reasonable" in individual cases

Like the AAA itself, the regulatory framework provides no "objective benchmark" by which "reasonable efforts" can be measured. In *Wright* and *Wilder*, this Court found that the statutes' implementing regulations channeled the discretion of State

[22]Senator Cranston was the AAA's sponsor.

decision makers. Thus, in *Wright*, 479 U.S. at 432, the Court found the regulations contained specific guidelines for housing authorities to follow to determine a reasonable utility allowance, thereby creating a sufficiently specific and definite right. Similarly, in *Wilder*, the Court reinforced its conclusion that the Boren Amendment, already tied to an objective benchmark in the statute itself, was sufficiently specific to create enforceable rights, by looking to regulations that further defined factors the States "*must*" consider in setting rates. *Wilder*, 110 S. Ct. at 2522-23.

In contrast to the mandatory regulations at issue in *Wilder* and *Wright*, Section 671(a)(15)'s implementing regulation contains a laundry list of services the States "*may*" provide. 45 C.F.R. § 1357.15(e)(2). Likewise, the list of services gives no indication as to which services are "reasonable" in which cases. The regulation, like the AAA itself, provides no "gauge" by which federal courts may measure the reasonableness of state efforts in individual cases. (*See* App. 24a-25a (Manion, J., dissenting)). Plaintiffs' argument to the contrary (Brief in Opposition at 23) is untenable and is specifically refuted by the explanatory comments published by the Department of Health and Human Services ("HHS") at the time it issued the regulations.

In response to comments during the federal rule-making process requesting that HHS issue a rule mandating the provision of certain services under the "reasonable efforts" clause, HHS responded that "[t]he Department believes that it is *an inappropriate and unnecessary Federal intrusion to dictate nationally* a specific set of services which may or may not address a particular State's situation. Moreover, the Department believes that *it is essential to give States the flexibility and responsibility for these service decisions*." 48 Fed. Reg. 23107 (May 23, 1983) (emphasis added). HHS went on to note, however, that States would be required to identify in each individual child's case record the

services offered to the child and parents to prevent placement or reunify the family. *Id.* This requirement merely emphasizes Congress' approach that "reasonable efforts" be determined only in the context of each individual case.

3. Congress Could Not Have Intended To Create Different Federal Rights In Different States Or The Avalanche Of Federal Litigation And Federalization Of Child Welfare That Will Result From The Lower Court's Holding

The hazards of failing to adhere to the careful limits placed by *Pennhurst* on the creation of federal rights are evident in the likely outcomes from the decision below. First, by using the State's own administrative actions to define a federal statute left undefined by Congress, the court of appeals has created a federal right that by definition will vary radically from state to state. Moreover, the absence of an objective benchmark to limit this new right to "reasonableness" means the ruling below is boundless and will lead to a flood of individual lawsuits in federal court, not the state juvenile court, to enforce each individual child or parent's view of "reasonable efforts."

Finally, this ruling will choke the very innovation and improvement in child welfare services that was the stated purpose of the AAA. If each administrative act or program is subject to becoming a federally enforceable right, it is unlikely that the States will create greater exposure for themselves by initiating new services. As the dissent below warned, "Ironically, this decision, while attempting to advance the well-being of abused children, may instead result in the delay or denial of benefits." (App. 30a (Manion, J., dissenting)).

(a) By failing to apply the *Pennhurst* standard, the court improperly concluded that the AAA creates different federal rights in different states

Since the AAA itself is devoid of any objective benchmark for "reasonable efforts," the court of appeals looked to Illinois' own voluntary actions to determine what "rights" the AAA creates. (App. 11a-12a). That sort of judicial boot-strapping is flatly contrary to *Pennhurst.*

The court below reasoned that because Congress directed the States to devise a plan to provide "reasonable efforts" and left the method of delivery up to the States, each State's actions to develop programs and provide services are determinative of its liability under Section 671(a)(15). (App. 11a-12a). Following this analysis, the court held that Illinois' decision "to use caseworkers as the means through which these services are provided" created an enforceable right to have a caseworker assigned to each case within three days of the initial court order. *(Id.).*

The court claimed to rely on *Wilder* for this analysis:

> In *Wilder*, the Supreme Court stated that simply because a provision gives the state great latitude in promulgating a "reasonable and adequate" rate does not render the provision unenforceable for vagueness. Instead, once the state exercises its discretion to select a method of calculating rates a court is still capable of determining whether the rate itself is reasonable in light of the method chosen. *Wilder*, 110 S. Ct. at 2522-23.

(App. 11a).

In fact, nothing in *Wilder*, on the pages cited or elsewhere, stands for the proposition that a court may determine what Medicaid reimbursement rates are "reasonable and adequate" by looking after the fact to the rates that States voluntarily adopt. Rather, this Court required that the reasonableness of a State's rates be measured "against the objective benchmark of an 'efficiently and economically operated facility,'" as set forth in the

Boren Amendment itself. *Wilder*, 110 S. Ct. at 2523 (quoting 42 U.S.C. § 1396a(a)(13)(A)). Here, the AAA contains no such objective benchmark.

The analysis below is directly contrary to this Court's holding in *Pennhurst* that the legitimacy of federal-state cooperative funding statutes rests on the ability of States to determine the extent of their obligations at the time they accept federal money. *Pennhurst*, 451 U.S. at 17. "Though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or 'retroactive' conditions." *Id.* at 25. Not only is the court's creation of a new federal right ten years after passage of the AAA a surprise, but it is particularly unexpected for the States to find that individual State administrative and program actions form the basis for the substance of that new federal right.

The panel majority attempted to ameliorate the effect of its ruling by noting that "[t]he district court sought out and discovered a method of enforcing the 'reasonable efforts' requirement that is tailored to DCFS practices." (App. 13a). The anomalous result, however, is that the purported federal right to "reasonable efforts" to keep or return a child home will be substantively different from state to state, and could vary even from district to district within a state. Nothing in *Wilder* supports such a result. Although this Court recognized that the Boren Amendment accorded States the discretion to choose among varying methods of calculating rates, the uniform right established under the federal statute was to "reasonable and adequate" rates as measured against the objective benchmarks set forth by Congress. *Wilder*, 110 S. Ct. at 2522-23.

(b) The virtually boundless right to "reasonable efforts" makes the federal court, not State authorities, the "crisis administrator of child welfare"

The new federal right created by the opinion below means that every child served by a state child welfare agency may sue the State when that child, or the child's advocate, believes that the State's efforts have not been "reasonable." (*See* App. 29a (Manion, J., dissenting)). The resulting "avalanche" of Section 1983 litigation will "move[ ] the court from its proper role as impartial arbiter of cases and controversies under the law to that of a crisis administrator of child welfare." (App. 29a-30a (Manion, J., dissenting)).

The federal court's role as a "super-juvenile court" second-guessing specific state decisions and actions in individual cases is aptly illustrated by *Norman v. Johnson*, 739 F. Supp. 1182, decided shortly after the district court's ruling here. In *Norman*, the court engaged in a detailed review of the circumstances and services provided to the parents in three individual cases. *Id.* at 1196-1202. After finding that Illinois had not exercised "reasonable efforts" to reunify two of the families, the court issued individualized injunctions on behalf of those parents. *Id.* at 1192. The court denied injunctive relief for the third parent because the court found the State's efforts "reasonable." However, the court also indicated that it might reconsider that ruling if the State did not provide the parent in question with sufficient beds. *Id.* at 1208 & n.8 (Report and Recommendation of Magistrate adopted by district court).[23]

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[23]*Norman* also illuminates the flaws in plaintiffs' argument that abstention and collateral estoppel regularly would bar federal courts from reviewing individual "reasonable efforts" claims. Although raised by DCFS, the *Norman* court rejected both arguments. *See Norman*, 739 F. Supp. at 1189-90. Thus, the *Norman* parents were able to use Section 1983 to bypass the state juvenile court system to enforce their idea of "reasonable efforts." *Norman* highlights the fact that if Section 671(a)(15) creates a federal right, the federal courts likely will supplant much of the state juvenile justice system, a result contrary to the structure of the AAA. *See* 42 U.S.C. § 672(a).

The court of appeals was aware of *Norman* when it decided this case (*see* App. 14a (citing *Norman*)), and made only the cursory comment that it was "not creating federally enforceable rights to beds, monetary assistance, or housing." (App. 16a-17a). Yet, the court gave no explanation how *Norman* would come out differently under its holding, or why the federal courts will not see an "avalanche" of *Norman* cases.[24]

To the extent plaintiffs would suggest that an enforceable right to "reasonable efforts" is somehow necessary to sustain systemic challenges to state child welfare systems, plaintiffs overlook the significant constitutional claims that have been found in other actions. *See, e.g., B.H. v. Johnson*, 715 F. Supp. 1387 (dismissing "reasonable efforts" claim but upholding sweeping challenges to the entire foster care system based on substantive due process rights); *see also K.H. v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Aristotle P. v. Johnson*, 721 F. Supp. 1002. As Judge Manion noted, "Until Congress specifies certain individual rights under the AAA, this court should confine § 1983 actions against the DCFS to alleged constitutional violations such as those in *K.H. v. Morgan, supra, B.H. v. Johnson, supra*, and *Aristotle P. v. Johnson, supra*, and otherwise stay out of what is now a reasonably streamlined and publicly accountable chain of command in the distribution of child welfare and assistance benefits." (App. 30a (Manion, J., dissenting)).

(c) By converting state administrative and program actions into federal rights the opinion below subverts the purpose of the AAA to the detriment of the children served by the States

The creation of a right to "reasonable efforts" disrupts the delicate balance of federal and state interests in the AAA. The unfortunate result may be that although plaintiffs and the court

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[24]The court of appeals may have intended to draw a line between class actions to enforce the AAA and individual actions. However, under Fed. R. Civ. P. 23, plaintiffs may bring a class action only if each individual plaintiff could state a claim. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

below intended to assist abused and neglected children, the Court's holding may in fact subvert the AAA's primary purpose.

Congress intended that the AAA encourage innovation in child welfare practice.[25] S. Rep. No. 336, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. Code Cong. & Admin. News 1448, 1450. By creating a right to "reasonable efforts" and then looking to the State's own actions to determine what is "reasonable," the decision below creates disincentives for improvements in the child welfare system. If a State adopts progressive programs, or expands the provision of present services, advocates will assert that such programs are "reasonable" and therefore must continue (regardless of whether they work or are cost-effective) because they constitute a federal right.[26] States therefore will be reluctant to launch such new programs, and may even reduce current services, in order to avoid expansive liability under the "reasonable efforts" clause.

B. The AAA Provides A Comprehensive Enforcement Mechanism Thereby Foreclosing A Remedy Under Section 1983

Even if, *arguendo*, a federal right to "reasonable efforts" exists in the AAA, the statute nonetheless sets forth remedial devices

[25]This Court has long recognized that the States are the proper "laboratories" for crafting solutions to "difficult and sensitive problem[s]." *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2859 (1990) (O'Connor, J., concurring) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

[26]In fact, questions have been raised as to the wisdom and effectiveness of family preservation services developed under the AAA. *See*, Magura, *supra*, at 200 (concluding that it is "doubtful" that foster care prevention programs are less expensive than foster care); Wald, *Family Preservation: Are We Moving Too Fast?*, Public Welfare 33 (Summer 1988) (questioning development and direction of family preservation programs); Garrison, *supra*, at 1801-02 (citing significant problems with in-home service programs). The ability of States to respond to such questions and considerations will be greatly limited if children and parents are permitted to enjoin the modification or discontinuation of a program because it is construed to be a "reasonable effort."

"sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Middlesex County Sewerage Auth. v. National Sea Clammers Assoc.*, 453 U.S. 1, 20 (1981).

As set forth in Part I.A.2.(b) above, Section 672(a) of the AAA specifically provides for a state court judicial determination that "reasonable efforts" were made, in the context of also considering the welfare of the child and the risk of harm at home. 42 U.S.C. § 672(a)(1). *See also* § 675(1) (defining required "case plan" describing for each child the services "provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, [or] facilitate return of the child to his own home"); (5)(B) (requiring review of child's case plan at least once every six months by a court or administrative body); (C) (requiring procedural safeguards including "dispositional hearing to be held, in a family or juvenile court or another court . . . or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement. . . .").

The presence of explicit state judicial and administrative enforcement mechanisms distinguishes the AAA from the Boren Amendment. *See Wilder*, 110 S. Ct. at 2524 (the "Medicaid Act contains no . . . provision for private judicial or administrative enforcement"). Instead, the AAA's enforcement scheme more closely resembles that under the Education of the Handicapped Act ("EHA"), which this Court found sufficiently comprehensive to foreclose Section 1983 actions in *Smith v. Robinson*, 468 U.S. 992, 1003 (1984). The EHA explicitly authorized a direct private right of action. *Id.* The AAA goes even further by requiring judicial review of "reasonable efforts" prior to custody in every child's case. *See* 42 U.S.C. § 671(b).[27]

[27]In addition, the AAA reinforces this mandatory judicial review with numerous administrative enforcement options. Section 671(b) empowers the Secretary to withhold funds otherwise allocated to a State when that

(Footnote continued)

Given the AAA's comprehensive enforcement framework, Section 1983 should not be allowed to supplant intentional omissions from that scheme. *Smith*, 468 U.S. at 1003. Instead, the Court should recognize that the AAA is fully consistent with the federal courts' traditional deference to specialized state courts in matters of child welfare.

II.

CONGRESS DID NOT INTEND TO CREATE AN EXPANSIVE IMPLIED PRIVATE RIGHT OF ACTION FOR "REASONABLE EFFORTS"

The court below also found that plaintiffs could enforce Section 671(a)(15) directly.[28] (*See* App. 14a-18a). The court of appeals ac-

(Footnote 27 continued from previous page)
State is out of compliance with the statute. Interested individuals may participate in administrative hearings regarding compliance by a State. 45 C.F.R. § 213.15(b). Section 671(a)(12) requires that state plans filed with the Secretary provide "for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness."

[28]Plaintiffs suggest in their Brief in Opposition to the Petition that defendants have waived any challenge to the court of appeals' holding that the "reasonable efforts" clause authorizes an implied private right of action. (Brief in Opposition at 16-18). However, the Petition specifically challenges the court's finding on this point, and preserves the issue for the brief on the merits without cluttering the Petition with overlapping questions. (Petition at 7 n.1). Although the burden of proof differs between Section 1983 and implied private rights of action, the analysis is strikingly similar. *See, e.g., Wilder*, 110 S. Ct. at 2526 (Rehnquist, C. J., dissenting) ("significant area of overlap" exists between Section 1983 and *Cort v. Ash* analysis; in both cases, "the language used by Congress must confer identifiable enforceable rights"); (App. 15a (*Cort v. Ash* analysis "closely resembles" Section 1983 analysis; only burden of proof differs)). (*Cf.* App. 42a (it "would be anomalous" to reach different results under the two standards)).

(Footnote continued)

knowledged that the *Cort v. Ash* test[29] "closely resembles" the Section 1983 analysis, except that plaintiffs bear the burden of proving each element of the *Cort* test. (App. 15a). Given that the court of appeals found enforceable rights under Section 1983, the court felt no need to undertake the full *Cort* analysis. In fact, both holdings are erroneous, for the reasons set forth in part I.A., above.

The central inquiry under *Cort* is whether Congress intended to create a private cause of action either directly or by implication. *Transamerica Mortgage Advisers, Inc. v. Lewis*, 444 U.S. 11,

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(Footnote 28 continued from previous page)

Plaintiffs' hypertechnical approach would require petitioners to load petitions with restatements of closely related questions. Supreme Court Rule 14.1 specifically admonishes the parties to avoid unnecessary or repetitious questions, and states that the Court will consider questions "fairly included" within the questions in the Petition. Given that admonition, and the substantial similarity between the inquiries under Section 1983 and *Cort v. Ash*, 422 U.S. 66 (1975), petitioners chose specifically to preserve this issue, fairly subsumed in question 1 of the Petition, in the body of the Petition. *See, e.g., Peters v. Kiff*, 407 U.S. 493, 495 (1972) (holding that question was not waived where raised below, presented in the body of petition, and where opposing party had opportunity to respond to the question); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n.12 (1981); *see also Olmstead v. United States*, 277 U.S. 438, 466 (1928).

[29]Both parties and the courts below agree that the standard announced by this Court in *Cort v. Ash*, 422 U.S. 66 (1975), governs implication of a private right of action:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted", . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And, finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted) (emphasis in original).

23-24 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979).[30] The AAA contains no express grant of a private right of action. Nothing in the AAA or its legislative history provides the evidence of congressional intent required before the Court will create such a right by implication.

The court below accepted the district court's reasoning that, because some courts have found a private right under Section 671(a)(16) of the AAA, the case plan and case review provision, Section 671(a)(15) is likewise enforceable. (App. 17a (citing *Lynch v. Dukakis*, 719 F.2d 504)). That holding disregards the clear distinction Congress drew when it chose to explicitly define the case plan and case review requirement. 42 U.S.C. §§ 675(1), (5). *See* Part I.A.2.(b) above.

Indeed, the AAA's sponsor specifically stated that Congress intended to "leav[e] to the discretion of the States the precise mechanisms for protecting the rights of persons in the foster-care system." 125 Cong. Rec. 22685 (1979) (remarks by Sen. Cranston). Given that indication that Congress did not intend to create privately-enforceable rights, the holding to the contrary is plainly erroneous. Whatever Congress may have intended with respect to case plans and case reviews, plaintiffs cannot show that Congress intended to create a private right of action to obtain "reasonable efforts."

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[30]In *Wilder*, this Court recently reemphasized that the *Cort* "test reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes." *Wilder*, 110 S. Ct. at 2517 n.9. Because of that concern, the Court has been extremely reluctant in recent years to infer private rights of action from congressional silence. *See Thompson v. Thompson*, 484 U.S. at 190 (Scalia, J., concurring in the judgment) ("The recent history of our holdings is one of repeated rejection of claims of an implied right. This has been true in 9 of 11 recent private right of action cases heard by this court.").

Nor can plaintiffs satisfy the final two *Cort v. Ash* prongs. Implication of a private right of action to enforce Section 671(a)(15) is not "consistent with the underlying purposes" of the AAA, *Cort*, 422 U.S. at 78, because the implication of private rights upsets the careful balance of federal and state power implicit in the statute and effectively federalizes the law of child welfare, a result not contemplated by Congress. *See* Part I.A.3., above.

Likewise, this "cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States." *Cort*, 422 U.S. at 78; *see also Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 541 (1984) (relying on fourth *Cort* prong to find no implied right of action by investment company under Investment Company Act). As discussed above, this Court has consistently recognized that child welfare and family law are primarily matters of state concern. Thus, plaintiffs have not met the heavy burden for creation of sweeping new substantive rights from congressional silence.

III.

IN THE ABSENCE OF PROVIDING FEDERAL FUNDS FOR SERVICES TO CHILDREN WHO ARE NOT IN FOSTER CARE, CONGRESS COULD NOT HAVE INTENDED TO CREATE A FEDERAL RIGHT UNDER TITLE IV-E TO SUCH SERVICES

As discussed in Part I above, the cornerstone of *Pennhurst* is that federal-state cooperative funding statutes are "contracts" between Congress and the States: "[I]n return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17. However, if Congress intends to impose such conditions, "it must do so unambiguously," *id.*, "since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Id.* at 16-17.

In this case, the court below held that a federal right to "reasonable efforts" under Title IV-E existed not only on behalf of children in federally-funded foster care, but also on behalf of children who are at home with their families, who receive no services funded under Title IV-E. The court's analysis of this point, in its entirety, states:

> As Judge Shadur explained in analyzing the relevant provisions of the AAA, the language of that statute does not reveal an intention by Congress to limit its terms only to children actually in foster care outside the home, *Artist M.*, [App. 39a-40a], and the DCFS fails to provide a compelling reason to read such a distinction into the statute.

(App. 18a).

The "compelling reason" is plain on the face of the statute. Section 670 of the AAA declares that the "purpose" of Title IV-E is to "enabl[e] each State to provide, in appropriate cases, foster care and transitional living programs for children . . . and adoption assistance for children with special needs. . . ." 42 U.S.C. § 670. The statute goes on to specify that federal funds are available under Title IV-E for "foster care maintenance payments" made on behalf of children who reside in a "child care institution" or a "foster family home." 42 U.S.C. § 672. No mention is made of any Title IV-E funds for services or programs to children residing at home.[31]

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[31]In the Seventh Circuit and in their Brief in Opposition to the Petition, plaintiffs cite provisions contained in Title *IV-B*, 42 U.S.C. §§ 620-28, in support of their argument that children at home have enforceable rights under Title *IV-E*. (Brief in Opposition at 26). Section 671(a)(15), the provision that plaintiffs seek to enforce, is contained in Title *IV-E*, *not* Title *IV-B*. The two titles are distinct programs, a fact plaintiffs recognized in the district court where they expressly waived any reliance on Title IV-B in bringing this suit. (*See* R.60 at 20 n.8). Moreover, it is clear under the terms of Title IV-B that Congress intended those provisions to serve simply as "congressional 'encouragement' of state programs [rather than] the imposition of binding obligations on the States."

(Footnote continued)

In *Pennhurst*, this Court rebuffed a similar invitation to create rights where Congress provided no funding:

> The fact that Congress granted to Pennsylvania only $1.6 million in 1976, a sum woefully inadequate to meet the enormous financial burden of providing "appropriate" treatment in the "least restrictive" setting, confirms that Congress must have had a limited purpose in enacting § 6010. *When Congress does impose affirmative obligations on the States, it usually makes a far more substantial contribution to defray costs.*

Pennhurst, 451 U.S. at 24 (emphasis added).[32] The holding in this case to the contrary, permitting children living at home to individually enforce provisions of Title IV-E, fundamentally alters the basic tenets of enforceable rights law.

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Pennhurst, 451 U.S. at 27. For example, the purpose of Title IV-B, as distinct from Title IV-E, is set forth as "enabling the United States, through the Secretary, to *cooperate* with State public welfare agencies in *establishing*, *extending* and *strengthening* child welfare services. . . ." 42 U.S.C. § 620(a) (emphasis added). "Child welfare services" are defined under Title IV-B as "public social services which are directed toward the accomplishment" of a list of ambitious "purposes," such as "protecting and promoting the welfare of all children," "preventing or remedying . . . the neglect, abuse, exploitation or delinquency of children," and "preventing the unnecessary separation of children from their families." 42 U.S.C. § 625(a)(1). As the court in *B.H. v. Johnson* found in distinguishing Titles IV-B and IV-E, "Congress intended Title IV-B to be an expression of goals and guiding principles rather than an enactment that creates enforceable federal rights." 715 F. Supp. at 1401.

This conclusion is reinforced by the fact that Congress has appropriated only $325 million nationwide to fund Title IV-B. 42 U.S.C. § 620(a). By contrast, the appropriation in fiscal year 1991 for children and family services in Illinois alone was nearly $500 million. 1990 Laws of Illinois 86-1142; 1991 Illinois Legislative Service 87-2, 87-6 (West).

[32]This Court in *Wilder* also recognized the importance of considering the amount of federal funds a state receives, noting that "the Federal Government provides funds to cover between 50% and 83% of the cost of patient care." *Wilder*, 110 S. Ct. at 2518 n.10. Medicaid reimbursement for 1988 totaled $29 billion. *Id.* It was such costs that the Boren Amendment required be reimbursed to medical facilities at "reasonable and adequate" rates.

The absence of any basis for this ruling in Title IV-E itself[33] is evidenced by the arbitrary distinction applied by the courts below between children residing at home under Juvenile Court orders, who may enforce the AAA, and other children living at home served by DCFS, who may not.[34] That distinction draws no support from the AAA, which never mentions juvenile court protective orders.

The district court suggested that DCFS distinguishes such children by petitioning for court orders. (App. 40a n.7). However, under Illinois law it is the State's Attorney,[35] not DCFS, that files petitions alleging a child may be abused, neglected or dependent. *See* Illinois Juvenile Court Act § 2-13, Ill. Rev. Stat. ch. 37, ¶ 802-13 (*See also* 1/17/89 Tr. at 275 (testimony that the State's Attorney, not DCFS, determines whether to seek a protective or supervision order)). Indeed, the Juvenile Court Act provides that "*[a]ny* adult person, any agency or association . . . or the court on its own motion" may direct such a filing through the State's Attorney. *Id.* (emphasis added).[36]

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[33]The mere fact that Section 671(a)(15) *refers* indirectly to children not yet in foster care does not mean that Congress intended for those children to have a right to sue under the AAA. *See, e.g., Pennhurst*, 451 U.S. at 24.

[34]In Cook County, approximately 15% of new cases involved children in DCFS custody and placed in foster care or other substitute care placement; 8% were children being served in their own homes under a juvenile court protective or supervision order; and the remaining three quarters were children being served in their own homes with no court order at all. (1/17/89 Tr. at 260-64).

[35]In Illinois, the State's Attorney is the county prosecutor in all civil and criminal suits, indictments, and prosecutions. *See* Counties Code § 3-9005(1), Ill. Rev. Stat. ch. 34, ¶ 3-9005(1). *See generally* Ill. Const. Art. 6, § 19; Counties Code §§ 3-9001-3-9012, Ill. Rev. Stat. ch. 34, ¶¶ 3-9001-3-9012.

[36]After a petition is filed, but before an adjudication is reached that a child is in fact abused, neglected or dependent, the juvenile court (not DCFS) may allow a child to remain at home and continue the case

(Footnote continued)

Moreover, the AAA is a federal statute that must be applied consistently in the several States, while protective orders mean different things in different States, and even in different counties within Illinois. The issue is not whether a distinction can be drawn, but whether such a distinction is justified under the language of the federal statute.[37] The strained effort to craft a wholly arbitrary line without any basis in the AAA's language, structure, history, or regulatory scheme demonstrates the extent to which the court below stretched the enforceable rights analysis beyond its boundaries.

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under court supervision, Juvenile Court Act § 2-20, Ill. Rev. Stat. ch. 37, ¶ 802-20, or, following an adjudication, the juvenile court (not DCFS) may release the child to his parents subject to an order of protective supervision. Juvenile Court Act §§ 2-23(b)(2), 2-24, 2-25, Ill. Rev. Stat. ch. 37, ¶¶ 802-23(b)(2), 802-24, 802-25. Nothing in the Juvenile Court Act specifies that it is DCFS that supervises all such children at home under court order; indeed, Section 2-24 regarding protective supervision states that the parents, or other private individual with custody of the child, may be placed under the supervision of the *probation office*. In Cook County, the informal practice has developed to provide in certain protective and supervision orders that DCFS shall report to the court on the child and family; however there is no statutory authority defining when or how such designations shall occur.

[37]Even if the distinction had support in the AAA itself, an arbitrary decision to deprive children residing at home of a federal right, solely because those children are not served by the States pursuant to a court order, might run afoul of the equal protection clause. *See, e.g., United States Dep't of Agriculture v. Molero*, 413 U.S. 528 (1973) (holding that classification scheme of Food Stamp Act was not "rationally related to a legitimate governmental interest"). Even within Cook County itself, the presence or absence of a court order often bears little relationship to the need for preventive services. (*See* 1/17/89 Tr. at 261). Thus, the line mandated by the courts below arguably bears no rational relationship to the AAA's purposes.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitioners Sue Suter and Gary T. Morgan respectfully ask that this Court reverse the decision of the United States Court of Appeals for the Seventh Circuit, and remand for dismissal of the case.

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